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No. 03-1144

Supreme Court, U.S.
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In The

Supreme Court of the United States

MAXINE CAMERON-GRANT, ROSS BASIL, FELESHIA TISSIERA and VELDA A. FREDERICK,

Petitioners,

v.

MAXIM HEALTHCARE SERVICES, INC., a Foreign corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the case is moot and the Petitioner lacks standing to appeal the District Court's denial of a motion to proceed as a collective action under 29 U.S.C. § 216(b) because he lacked a personal stake in the action after completely resolving all of his claims and agreeing to a voluntary dismissal with prejudice?

RULE 29.6 STATEMENT

Respondent is Maxim Healthcare Services, Inc., which has no parent corporation and no publicly held company owns 10% or more of its stock.

The caption of the case contains the names of all parties to the proceeding, except that Respondent contends that Ross Basil is the only Petitioner. While the Petition for Writ of Certiorari and case caption refer to Maxine Cameron-Grant, Ross Basil, Feleshia Tissiera, and Velda A. Frederick as the "Petitioners," only Ross Basil filed a Notice of Appeal below, he was the only appellant before the Court of Appeals, and he is thus the sole Petitioner before this Court.

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BRIEF IN OPPOSITION FOR THE RESPONDENT

JURISDICTION

Respondent Maxim Healthcare Services, Inc. ("Respondent Maxim") contends that Petitioner Ross Basil ("Petitioner Basil") lacks standing and the case is moot, thus depriving this Court of subject matter jurisdiction under Article III of the Constitution. Respondent Maxim also contends that Petitioner Basil is the sole petitioner because Maxine Cameron-Grant, Feleshia Tissiera, and Velda A. Frederick (named plaintiffs in the District Court) did not file a notice of appeal below and were not appellants before the Court of Appeals in this case; thus, with respect to Maxine Cameron-Grant, Feleshia Tissiera, and Velda A. Frederick, this Court also lacks jurisdiction over the question presented.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to 29 U.S.C. § 216(b), which is restated in full in the Petition, the question presented involves Article III of the Constitution, the relevant text of which is stated below:

Article III, Section 2

> Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the

United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

STATEMENT OF THE CASE

I. Clarification Of Assertions In Petitioner's Statement Of The Case.

The detailed factual allegations made by Petitioner Basil on page 2 of the Petition regarding the purported manner in which Respondent Maxim calculated overtime pay, were not established below and are not relevant or material to the question presented. No claim in the case below was adjudicated on the merits before a trier of fact.

II. Background.

Respondent Maxim is a provider of, among other services, home healthcare services. To provide home healthcare services, Respondent Maxim employs home healthcare nurses who are assigned to work shifts with patients at their homes. The rate of pay a home healthcare

nurse receives varies from nurse to nurse depending on a variety of factors, such as the nurse's skill level and certification, the geographic region, the type of insurance or other payor reimbursement source for the services, the medical needs of the patient, and the difficulty of staffing a particular shift because of the shift hours, the day of the week, or because of a difficult family environment. The rates of pay offered to nurses for accepting a shift may vary from shift to shift, week to week or month to month depending upon a multitude of factors, such as whether the shift needs immediate coverage or is on a weekend or holiday.

Although Respondent Maxim processes its payroll from different offices in a similar manner with regard to how the payroll data is inputted into the computer system for transmission to the corporate headquarters, and ultimately to the third party payroll vendor that issues the paychecks, the actual negotiating of shift and patient rates with nurses is conducted solely at the local office level and is controlled by the individual Office Managers and recruiters.

III. The Case Below.

The Plaintiffs below were home healthcare nurses employed at various times by Respondent Maxim. This action originated in April of 2002, when Petitioner Basil and three other individuals, filed a Complaint in the District Court against Respondent Maxim, alleging violations of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201-219 ("FLSA") and seeking alleged unpaid wages, liquidated damages and recovery of fees and costs.

Respondent Maxim answered the Complaint denying the alleged violations of the FLSA.

While the Plaintiffs' Complaint made allegations that there were other similarly situated employees of Respondent Maxim and that the action was also brought on their behalf, during the course of the case, no other individuals opted-in or joined the action, and the named Plaintiffs did not present any admissible evidence to the District Court that any other allegedly similarly situated current employees of Respondent Maxim had claims under the FLSA against Respondent Maxim and wanted to opt-in or join the case.

Approximately five (5) months after filing the case, the four Plaintiffs filed a motion seeking to issue court supervised notification to alleged similarly situated employees of Respondent Maxim and to proceed as a collective action under Section 216(b) of the FLSA. Respondent Maxim opposed the Plaintiffs' motion on the grounds that, given the multitude of factors that cause the rates of pay to vary from nurse to nurse and from shift to shift, combined with the setting of wage rates locally, there were no similarly situated current or former employees. Respondent Maxim also opposed the Plaintiffs' motion on the basis that they had failed to produce any admissible evidence, despite having ample opportunity for discovery, that any allegedly similarly situated individuals wanted to opt-in to the case.

After filing their motion, three of the four Plaintiffs dismissed their claims with prejudice, and the stipulated dismissal was accepted by the District Court, thus leaving Petitioner Basil as the sole remaining plaintiff in the case. Following Respondent Maxim's stipulation in the parties'

Joint Pretrial Stipulation submitted to the Court to pay Petitioner Basil all of his claimed unpaid wages, liquidated damages, and costs and attorneys' fees, the District Court issued an order denying the Plaintiffs' motion to allow notification to potential opt-in plaintiffs and to proceed as a collective action. In its order, the District Court concluded that: "[t]he record in this case contains no admissible evidence that any employees desire to opt-in to this action." (App. 21).[1] The District Court specifically noted that the Plaintiffs had ample opportunity to engage in discovery and meet the minimal burden of showing that other allegedly similarly situated employees desired to opt-in to the action. (App. 21).

Following the Court's order, Petitioner Basil and Respondent Maxim stipulated to voluntarily dismiss with prejudice Petitioner Basil's only other claim in the case, and the District Court accepted the dismissal. Petitioner Basil and Respondent Maxim then filed a Stipulated Final Judgment And Order Of Dismissal With Prejudice seeking an order entering a stipulated final judgment as to the claim on which Respondent Maxim stipulated to providing full relief to Petitioner Basil and dismissing the action with prejudice. In the Stipulated Final Judgment, Petitioner Basil and Respondent Maxim stipulated that Petitioner Basil had received all claimed unpaid wages, liquidated damages, costs and attorneys' fees and that no other claims remained pending in the case. The order of the District Court entering final judgment and dismissing

[1] References to "App." are to the Appendix to the Petition for Writ of Certiorari, followed by citation to the applicable Appendix page number.

the case with prejudice provided that Respondent Maxim "agreed to pay, and now has fully paid [Basil] all claimed unpaid wages and overtime pay, liquidated damages equal to that amount, and [Basil]'s costs and attorneys' fees" and that "[a]ll other claims in this case have been dismissed with prejudice." (App. 5).

On March 24, 2003, Petitioner Basil filed a Notice of Appeal, appealing the District Court's Order denying the motion to allow the action to proceed as a collective action and to permit court supervised notification to potential opt-in plaintiffs. The other three plaintiffs below did not file a notice of appeal and, although they were listed in the appellate case caption, they were not appellants before the Court of Appeals. At the time Petitioner Basil filed his Notice of Appeal, no other plaintiff or claims remained in the case below, and all claims had been dismissed with prejudice by voluntary stipulation or stipulated judgment and accepted by the District Court.

In a carefully reasoned opinion, the Court of Appeals at the outset recognized that the appeal raised "an issue of first impression: whether a district court's denial of a motion to notify potential opt-in plaintiffs under § 216(b) of the FLSA may be reviewed on appeal after the named plaintiff's personal claims have become 'moot.'" (App. 6). Noting that the general rule is that settlement of a plaintiff's claims moots an action, the Court of Appeals then analyzed whether the unique mootness principles in the Federal Rule of Civil Procedures Rule 23 class action context apply to collective actions brought under § 216(b) of the FLSA. Specifically, the Court of Appeals looked at the issue whether Petitioner Basil had any personal stake remaining in the case and concluded that he did not. (App. 15). In reaching that conclusion, the Court first properly

recognized that Petitioner Basil did not contend that he had any remaining "economic interest" in the case. (App. 8).

Next, the Court analyzed and squarely rejected Petitioner Basil's contention that, like a named plaintiff in a Rule 23 class action, he had a procedural right to represent a class independent of his substantive claims under Section 216(b) of the FLSA. The Eleventh Circuit, focusing on the plain language and legislative history of Section 216(b) of the FLSA, held that there is a fundamental, irreconcilable difference between Section 216(b) collective actions and Rule 23 class actions, and that Petitioner Basil presented only a personal claim on the merits. (App. 15). Therefore, because Petitioner Basil had no personal stake in the action, and since no pending claims or plaintiffs remained in the case below, the Court of Appeals dismissed the appeal as moot. (App. 16).

ARGUMENT

The Petition fails to present any issue that could plausibly warrant this Court's review and fails to satisfy any of this Court's criteria for a grant of certiorari. The Court of Appeals correctly found the case presented an issue of first impression. An issue of first impression, which no other court of appeals has spoken to, is not an issue ripe for consideration by this Court. Additionally, the case applies only to a few people and has little practical or real-world importance to the overwhelming majority of individuals bringing claims under the FLSA. Furthermore, the Petition fails to raise any recurring federal issue urgently requiring clarification by the highest court in the land. Finally, this action is moot and Petitioner's lack of

standing deprives this Court of jurisdiction. Accordingly, for the reasons stated below, the Petition should be denied.

I. The Petition Fails To Demonstrate Any Conflict Among The Circuits Or With This Court's Precedents.

The Petition satisfies none of the traditional criteria for granting certiorari. To begin with, Petitioner Basil cites to no conflict with a decision of any other court of appeals. Indeed, Petitioner Basil has not even pointed to any conflict with a decision of any lower federal court. Allowing other circuit courts to consider the issue, in a variety of distinct factual situations, might lead the lower courts to uniformly agree with the Eleventh Circuit's decision. And if not, the additional attention of these courts to the question would assist this Court were it eventually to consider the issue presented. *See* Robert L. Stern, *et al.*, Supreme Court Practice 229-230 (8th ed. 2002). Simply put, granting certiorari before other federal circuit courts of appeal have the opportunity to consider the question presented would be premature.

Likewise, Petitioner Basil has pointed to no conflict with prior decisions of this Court. Until an actual conflict arises, there is no need for the Court to spend its limited resources on a case where the only basis for certiorari is Petitioner Basil's desire to pursue a collective action on behalf of unknown employees against Respondent Maxim despite his failure to provide the District Court, following ample opportunity to engage in discovery, with any admissible evidence that there is a single other allegedly similarly situated individual desiring to opt-in to the case.

II. The Court Of Appeals' Decision Has An Exceedingly Narrow Effect And Is Not Of Widespread Importance.

Unable to point to any actual conflict on comparable issues, Petitioner Basil resorts to unreasonably overbroad and unsupported grandiose assertions that the issue presented has "national importance" because "it will affect every potential opt-in plaintiff in every Fair Labor Standards Act case filed in the United States." (Pet. 7).[2] In fact, the issue presented affects only the exceedingly small number of plaintiffs in the Eleventh Circuit who fully resolve and voluntarily stipulate to the dismissal of all of their claims but still desire, despite lacking any remaining personal stake in the action, to continue to pursue a collective action on behalf of unidentified employees who may or may not want to join the case.

The very nature and structure of an FLSA action brought under Section 216(b), demonstrates that Petitioner Basil's claim about the impact of the case is patently erroneous. The plain language of 29 U.S.C. § 216(b) makes clear that only those individuals who actually "opt-in" to an FLSA action by filing a written consent are members of the FLSA action. *See* 29 U.S.C. § 216(b); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001). A putative plaintiff who has not filed a written consent with the court to opt-in to an FLSA lawsuit cannot recover any damages and is not bound by any judgment rendered in the action. *Id.* Indeed, a putative plaintiff can

[2] Citations to "Pet." are to the Petition for Writ of Certiorari, followed by the applicable page number.

always bring his or her own Section 216(b) action. *See* 29 U.S.C. § 216(b); *Mackenzie v. Kindred Hospitals East, L.L.C.*, 276 F. Supp.2d 1211, 1216 (M.D. Fla. 2003) ("resolution of the plaintiff's FLSA claim will not compromise the right of any other employee to file suit"); *see also LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (analyzing the key distinction between Rule 23 class actions and Section 216(b) cases where in the latter actions putative plaintiffs must affirmatively opt-in to the case to be bound by a judgment).

Therefore, the rights of any potential opt-in plaintiff to this action and of any individual desiring to bring a claim under the FLSA are not affected in any manner by the Eleventh Circuit's decision or by a district court's denial of a named plaintiff's motion to proceed as a Section 216(b) collective action. Accordingly, the question presented impacts an extraordinarily few litigants in the highly unusual circumstances which occurred in the case below.

III. The Decision Below Is Plainly Correct.

Review in this case is also unnecessary because the Eleventh Circuit's decision is based on the only plausible interpretation of 29 U.S.C. § 216(b). The Eleventh Circuit's decision is plainly correct because it properly distinguishes between Rule 23 class actions and collective actions brought pursuant to Section 11c of the Portal-to-Portal Act. A failure to leave the Eleventh Circuit's decision intact would ignore a limitation placed on FLSA collective actions by Congress as previously recognized by this Court. *See Hoffmann-La Rouche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

The Court of Appeals, like this Court, correctly recognized that limitation. To determine whether Petitioner Basil had any remaining stake in the case, the Court of Appeals analyzed whether the named plaintiff in a Section 216(b) action under the FLSA has the right to represent others – that is, whether the named plaintiff has a right analogous to the right provided by Rule 23 in which the plaintiff can have a personal stake in representing a class separate from his personal interest in the suit. The Court of Appeals relied on both the legislative history of the enactment of Section 216(b) of the FLSA and the plain language of the statute to reach the correct decision. (App. 12-15).

In 1947, Congress enacted the Portal-to-Portal Act to amend the FLSA.[3] The 1947 amendments restricted employee rights by adding the "opt-in" provision, which provides that no employee can be a party plaintiff to any FLSA Section 216(b) action unless the employee gives written consent and the consent is filed in the court in which the action is brought. 29 U.S.C. § 216(b); *see also LaChapelle*, 513 F.2d at 287 & n.6. This Court has previously recognized that Congress' articulated goal in amending the FLSA by adding the "opt-in" language to Section 216(b) was in part a response to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome. *Hoffmann-La Rouche,* 493 U.S. at 173. As this Court opined in *Hoffmann-La Rouche, Inc.*: "[t]he amendment was for the

[3] As the Court of Appeals noted, the provisions of § 216(b) are derived in substantial part from the Portal-to-Portal Act of 1947, pt. IV, § 5, 61 Stat. 84, 87, 88 (1947). *See United Food & Commercial Workers Union v. Albertson's, Inc.*, 207 F.3d 1193, 1200 (10th Cir. 2000); *see also LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 287 n.6 (5th Cir. 1975).

purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions." *Id.*

Therefore, representative actions by plaintiffs with no personal claims were abolished and FLSA Section 216(b) was enacted to prevent large group actions from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit. *See id*; *Albertson's, Inc.*, 207 F.3d at 1200 (*quoting Arrington v. Nat'l Broad. Co.*, 531 F. Supp. 498, 501 (D.D.C.1982). Thus, the Eleventh Circuit properly concluded that the 1947 amendments to the "FLSA prohibit what precisely is advanced under Rule 23 – a representative plaintiff filing an action that potentially may generate liability in favor of uninvolved class members." (App. 14). The Eleventh Circuit's conclusion is thus plainly correct because it is firmly in accord with this Court's recognition in *Hoffmann-La Rouche, Inc.* of the intended purpose of the 1947 amendments to the FLSA.

Additionally, the fundamental structure of a Rule 23 class action is different than in a FLSA collective action. In a Rule 23 class action, the named plaintiff has a claim that "he is entitled to represent a class." *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980).[4] Also, in a

[4] Petitioner Basil relies heavily on the *Geraghty* case, in which this Court explicitly left open the question "whether a named plaintiff who settles the individual claim after denial of class certification" has a personal stake to appeal the denial of class certification. 445 U.S. at 404 n.10. However, because *Geraghty* involved only a Rule 23 class action and not an FLSA collective action, the actions are fundamentally different, thereby making *Geraghty*'s "class representative" analysis not instructive or applicable here.

Rule 23 class action, the rights of potential class members, including those who may have no knowledge of the action, are bound by a settlement of or judgment rendered in the action, unless they have affirmatively opted-out of the case. *See LaChapelle*, 513 F.2d at 288.

In contrast, under the plain language of § 216(b) of the FLSA, a named plaintiff, even if he can demonstrate that there are other potential plaintiffs "similarly situated" to him, has no right to represent them. Further, those putative plaintiffs who do not opt-in by written consent to the action will not be bound by or benefit from any settlement of the action or judgment. Consequently, unlike in a Rule 23 class action, there is no true "class" – only individuals with separate claims whose rights are not adjudicated or affected by the denial of a motion filed under Section 216(b) like the one filed by Plaintiffs in the case below. Thus, in contrast to Rule 23 class actions, the existence of a collective action under § 216(b) of the FLSA does depend on the active participation of other plaintiffs and the named plaintiff does not have the right to act in a role analogous to the private attorney general concept that underlies Rule 23 class actions.

Petitioner Basil's contention that the enactment of the FLSA after the adoption of Rule 23 shows the importance Congress has given to an alleged "right" to bring a collective action, turns statutory construction rules on their head. Given that the Rule 23 class procedure was in existence when the 1947 amendments to the FLSA were enacted, Congress' creation of a separate Section 216(b) collective action procedure for FLSA claims actually demonstrates Congress' intent that Rule 23 rights and procedures not apply to FLSA cases. Accordingly, the

Eleventh Circuit's decision was plainly correct and certiorari is not warranted.

IV. Petitioner's Appeal And Petition Are Undermined By Serious Article III Standing Problems.

Serious standing and jurisdictional questions make it doubtful that this Court could reach the merits of this case even if review was granted. As required by Article III of the Constitution, the exercise of judicial power by federal courts "depends upon the existence of a case or controversy." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (internal quotation marks omitted). Specifically, a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Given this Court's recognition in *Hoffmann* that the 1947 amendments to the FLSA were for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right, Petitioner Basil, in order to establish Article III standing, must prove that he *personally* has a remaining stake in the action. Here, as the Eleventh Circuit stated in its opinion, Petitioner Basil did not make any contention on appeal that he had any remaining economic stake in the action. To the contrary, Petitioner Basil filed a stipulation with the District Court in which he not only acknowledged that he had received everything he sought in the case and that there were no other remaining claims in the action, but he also requested an order dismissing the case with prejudice. Therefore, all of Petitioner Basil's claims in the case were extinguished, and he lacked any remaining personal stake in the action. *See Mackenzie*, 276 F. Supp.2d at 1211 (holding that the

case was moot and denying the plaintiff's motion to issue court facilitated notice and to proceed as a FLSA collective action because no other individual filed an opt-in consent, plaintiff failed to identify any similarly situated individual desiring to opt-in, and plaintiff was offered full relief). As such, he lacked standing to appeal the District Court's order to the Eleventh Circuit, and this Court lacks jurisdiction to hear the question presented.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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